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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1598

JAMES D. HODGSON, SECRETARY OF LABOR, P

v. ETITIONER

ARNHEIM AND NEELY, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STAT
OF APPEALS FOR THE THIRD CIRCUIT

TES COURT

REPLY BRIEF FOR THE PETITIONER

Although it is Arnheim's activities and the
on commerce that are the subject matter of
the briefs of the two respondents and th ir impact
curiae ignore this fact, as well as the Act's this suit,
of "enterprise," and dwell instead on the e *amicus*
condition and business activities of Arnheim definition
the building owners. In addition, the *amicu* economic
the language of the Act's minimum wage and 's clients,
provisions (Sections 6 and 7) as though th stresses
visions, rather than Section 3(r), are contr overtime
determining what constitutes an "enterpris hose pro-

Extensive argument is addressed to the rolling in
decided favorably to the government by the e."

questions
court of

appeals—whether Arnheim is an employer of these employees and whether the gross volume of business done by Arnheim should be measured by its commissions rather than by the rents collected at the buildings. We adhere to the position that these issues are not properly before this Court.[1] Since they were not discussed in our opening brief, however, we shall answer them here.

1. Contrary to the assumption of respondents and the *amicus curiae*, a holding that Arnheim's building management activities constitute a single enterprise is not tantamount to a holding that each building owner is also a covered enterprise. Nor would the holding we seek require that any building owner compensate its own employees in accordance with the Act's requirements, unless of course its employees are also employed in Arnheim's enterprise, in which event its liability would be limited to such jointly employed workers.

The instant case is thus no different from one involving a protection agency which services nine separately owned and unrelated warehouses. Such ware-

[1] In addition to *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 430, see also *Mills* v. *Electric Auto-Lite*, 396 U.S. 375, 381, n. 4; *Alaska Ind. Bd.* v. *Chugach Assn.*, 356 U.S. 320, 324–325; *Morley Co.* v. *Md. Casualty Co.*, 300 U.S. 185, 191; Stern and Gressman, *Supreme Court Practice* 314–315 (4th ed. 1969); Rule 23(1)(c), *Rules of the Supreme Court*. The cases cited by respondents are distinguishable, since they involve either matters ignored by the lower court (*Dandridge* v. *Williams*, 397 U.S. 471) or matters which would support a simple affirmance, without modification, of the lower court's disposition (*Bondholders Committee* v. *Comm'r*, 315 U.S. 189; *Jaffke* v. *Dunham*, 352 U.S. 280).

houses would not become a single enterprise simply because they all engage the same protection agency. On the other hand, the activities of the protection agency at each of the warehouses would be part of the agency's enterprise.

If the agency's enterprise meets the dollar volume test of Section 3(s), and if the warehouses exert sufficient control over the security guards to qualify as joint employers, they would be jointly liable for the statutory wage requirements, even though the warehouses are not themselves an enterprise and even though their other employees might not be employed in an enterprise or otherwise entitled to the Act's protection.

2. The *amicus* concedes that Arnheim is an "employer" but characterizes that status as derivative only and suggests that Arnheim, as an agent, can have no enterprise greater than that of its principal. The fundamental thrust of the *amicus's* argument is that if Arnheim does not bear the ultimate financial responsibility for payment of wages, the employees cannot be considered part of Arnheim's enterprise (Br. 2, 7, 9–11, 13). We do not agree that Arnheim's status as an employer is derivative only (see point 3, *infra*); in any event, the argument misconstrues the clear statutory requirements.

As pointed out in our main brief, the term "enterprise" refers to "activities" which are "related" and which are "performed (either through unified operation or common control) * * * for a common business purpose." There is no further requirement in the statute that these activities be performed by persons who are employed "by" the enterprise, and to imply any such

requirement would ignore the specific proviso in Section 3(r) that activities of a leased department can be part of a department store's enterprise, even though the department store is not the "employer" of the lessee's employees, and, like Arnheim here, is paid a commission or percentage of the leased department's total sales. See Section 3(r); 29 CFR 779.225.[3]

The significance of this point can be made clear by an example. Suppose that a portion of the space in a department store is leased to a beauty salon; the salon is operated by an independent company, and its employees are not hired or paid by the department store. Nevertheless, it is to the "enterprise" definition that one looks in determining whether the beauty salon is part of the department store's enterprise. If it is, its revenues are includable in determining whether the department store's enterprise meets the dollar requirements of Section 3(s); and the beauty salon's em-

[3] The cases cited at pages 8 and 9 of the *amicus* brief do not support its contrary view. Thus, *Hodgson* v. *Royal Crown Bottling Company, Inc.*, 324 F. Supp. 342 (N.D. Miss.), affirmed, 465 F. 2d 473 (C.A. 5); *Wirtz* v. *Lone Star Steel Company*, 405 F. 2d 668 (C.A. 5); and *Mungovan* v. *Manierre*, 7 *Lab. Cas. para.* 61,646 (N.D. Ill.), do not involve enterprise coverage. In *Wirtz* v. *Country Club Acres, Inc.*, 58 *Lab. Cas. para.* 32,096 (N.D.N.Y.), affirmed, 63 Lab. Cas. para. 32,361 (C.A. 2), which did arise under the Act's enterprise provisions, the scope of the enterprise was determined without reference to the employment status of persons working for the different components of the enterprise. In the remaining case the *amicus* cites, *Shultz* v. *Isaac T. Cook Company*, 314 F. Supp. 461 (E.D. Mo.), the district court, in excluding one building from the management company's enterprise, found that the building maintenance employees were neither hired, fired, nor controlled by the management company and were, therefore, not its employees. It did not address itself to the question whether the building management company performed any activities at the excluded building which would constitute a part of its enterprise.

ployees, being employed in an "enterprise," are thereby entitled to the benefits of the Act even though the company operating the salon might not be a covered enterprise and, further, even though the employees are not employees of the department store, and it has no liability with respect to them under the Act.

Thus, it is the enterprise definition that determines whether the building maintenance personnel are covered by the Act. The only relevance the employment issue has in this case is with respect to Arnheim's responsibility for any violations affecting those employees. On that issue, the Third Circuit ruled in the government's favor. It is that issue which is governed by Sections 6 and 7 of the Act, cited and discussed by the *amicus* (Br. 6–8). Under those sections "every employer" is required to pay the requisite minimum wage and overtime compensation to "each of his employees who * * * is employed in an enterprise * * *." There is no requirement that the employees, in addition to being employed "in" an enterprise, also be employed "by" an enterprise.[8]

[8] The distinction between "in" and "by" is readily apparent and, when compared with other sections of the Act, is obviously deliberate. For example, in a 1949 amendment to Section 13(a)(2), Congress changed language establishing an exemption from coverage for any employee "engaged in" a retail establishment (52 Stat. 1067) to any employee "employed by" a retail establishment (63 Stat. 917; see 95 Cong. Rec. 14932). "[T]he [13(a)(2)] exemption * * * does not include those who happen to be engaged at but not 'employed by' an exempt retail establishment, even though perchance they might perform their functions literally inside the exempt establishment." *Mitchell* v. *Kroger Company*, 248 F.2d 935, 940 (C.A. 8). Here, in contrast to Section 13(a)(2), Sections 6 and 7 protect any employee "employed in an enterprise" regardless of whether he is also employed "by" the enterprise; where, as here, he is employed by both the enterprise and another employer, both em-

3. Although status as an employer under Sections 3(d), 6 and 7 is thus not determinative of the scope of a Section 3(r) enterprise, it is manifest from the facts here that nearly every significant incident of the employment relationship with respect to the building maintenance employees is controlled by Arnheim and not by the building owners. Thus, is it Arnheim which hires, fires and supervises these employees. It also sets the wages and prepares the pay checks. In other words, as the district court concluded (App. 73, n. 5), Arnheim is not "simply 'acting * * * in the interest of an employer'" (which, as the courts below held, would be sufficient under the Act's broad definition), but is itself the primary employer of these workers.[4] See *Herbert Harvey, Inc.* v. *National Labor Relations Board*, 424 F.2d 770, 774–775 (C.A. D.C.); *Herbert Harvey, Inc.* v. *National Labor Relations Board*, 385 F.2d 684 (C.A. D.C.). These workers are essential to Arnheim's contractual agreement to perform all the activities necessary to maintain and operate the buildings, and are thus as much an "integral part" of its business (*Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 730) as are its office workers and other employees.[5]

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ployers are independently liable under Sections 6 and 7 for the Act's minimum wage and overtime payments.

[4] The court of appeals did not hold, as the *amicus* states (Br. 8), that the workers were in fact *employed* not by the Company [Arnheim] but by the owners."

[5] Contrary to the statement in respondents' briefs (Br. 15), the Secretary did charge violations with respect to Arnheim's central office employees, relating to the recordkeeping requirements of the Act (App. 34), and was granted relief on that issue.

The building maintenance employees are no less "real" employees because Arnheim does not ultimately bear the cost of their wages. The courts, including this Court, have repeatedly held that there may be an employment relationship in a variety of situations where the compensation is derived from sources other than the employer's pocketbook. See, *e.g.*, *Williams* v. *Jacksonville Terminal Co.*, 315 U.S. 386; *Southern Ry. Co.* v. *Black*, 127 F.2d 280 (C.A. 4). As the Fourth Circuit pointed out in *Southern Ry.*, *supra*, when it held that "red caps" were employees of the railroad despite the fact that they were compensated by the passenger (*id.* at 281–282):

> The determinative factor is not the source of their compensation, but the fact that they render services which are necessary to the proper running of [respondents' business], that they are hired or selected by [respondents] and permitted by them to render these services, that they are subject to the general supervision and control of [respondents] in rendering the services and that the [respondents] have the power to discharge them * * *.

Nor is there any merit to respondents' contention that Arnheim has no statutory obligation with respect to the building maintenance employees unless the individual building owner is also subject to the Act's coverage provisions (Br. 14). The courts have consistently recognized, under both the Fair Labor Standards Act and National Labor Relations Act, that an employer who is subject to the Act's requirements cannot enjoy the benefit of a joint employer's exempt

status. See *e.g., Wabash Radio Corporation* v. *Walling*, 162 F. 2d 391, 394 (C.A. 6), *Herbert Harvey, Inc., supra*, 424 F.2d at 774–775. The one case which held that suit could not be brought against the building management company (*Mungovan* v. *Manierre*, 7 Lab. Cas. para 61,646) was decided before *Greenberg* v. *Arsenal Bldg. Corp.*, 144 F.2d 292 (C.A. 2), and other subsequent cases recognizing the independent liability of the building management company. See *e.g., Herbert Harvey, Inc., supra*, 385 F.2d 684; *Herbert Harvey, Inc., supra*, 424 F.2d 770; see also *Barrow* v. *Adams & Co. Real Estate*, 46 N.Y.S. 2d 357.

4. The further argument that Arnheim's coverage under the Act will increase the business costs of Arnheim's clients and make it more expensive for them to use Arnheim's services is a truism which applies to all other businesses and which does not affect the proper disposition of this case.* The extension of the coverage of the Fair Labor Standards Act in 1961 and

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*Labor costs represent only a small part of the total cost of operating an apartment house or office building—7.4 percent and 18.6 percent, respectively. *Apartment Building Income Expense Analysis*, 1970, Chicago: Experience Exchange Committee of the Institute of Real Estate Boards of the National Association of Real Estate Boards; *1969 Office Building Experience Exchange Report*, Building Owners and Managers Association (1969), p. 4. Moreover, in view of the concern expressed for the small building owner, it is significant that the two smallest buildings managed by Arnheim are owned by the F. W. Woolworth Company (App. 21). Finally, as pointed out in our main brief (p. 22), there are undoubtedly advantages to be gained from engaging the management skills of Arnheim which would outweigh any disadvantages that might flow from the slight increase in costs attributable to Arnheim's coverage under the Fair Labor Standards Act.

1966 presumably increased the cost of many goods and services to many small businesses. But this fact does not mean that Congress intended all suppliers to be exempt to the extent that coverage might adversely affect the operating costs of their customers.[1] There is, of course, no broad exemption for small businesses, as suggested by the *amicus* (Br. 11–14). Thus, the Act's coverage has always applied to employees engaged in commerce or in the production of goods for commerce, whether their employer be a large or a small business. See, *e.g.*, *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388 (Act applied to a custom furniture establishment which also fabricated airplane parts and which had an annual dollar volume of $99,117); *Wirtz* v. *Floridice Company*, 381 F. 2d 613 (C.A. 5) (Act applied to a company whose annual sales ranged from $55,861 to $89,692).

5. Respondents' contention that the government is attempting to extend the Act to "local" businesses which Congress intended to exempt (Br. 7–8) is likewise based on its mistaken view that the impact of the

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[1] As the Eighth Circuit pointed out in *Hodgson* v. *A–1 Ambulance Service, Inc.*, 455 F. 2d 372, 374 (reversing a district court order relieving an ambulance company of its liability under the Act on the ground that otherwise the company would "go out of business" and leave the City of Little Rock without an ambulance service):

> But concerned as the court might understandably be about these local aspects, we think that they could not, as against the national policy involved in the Fair Labor Standards Act, provide a basis for discretion as to entering an order for payment of the wage deficiencies engaged in by the Company in violation of the statutory injunction * * *.

Act's coverage provisions must be considered in terms of their impact on Arnheim's clients. Even if Congress had intended to exempt office buildings and apartment complexes from the Act's coverage—which, in fact, it did not (see *Hodgson* v. *Travis-Edwards, Inc.*, 465 F. 2d 1050 (C.A. 5), certiorari denied December 18, 1972, No. 72-593—the enterprise here is not each local building, but the unified activities of Arnheim in managing and operating nine buildings, which activites do have the requisite impact on commerce.[8]

Respectfully submitted.

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Solicitor General.

ANDREW L. FREY,
Assistant to the Solicitor General.

RICHARD F. SCHUBERT,
Solicitor of Labor,

CARIN ANN CLAUSS,
Associate Solicitor,
Department of Labor.

JANUARY 1973.

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[8] Respondents' contention that the term "annual gross volume of sales" does not include gross receipts from those sales made in an agency capacity, where, as here, the enterprise performs all the activities necessary to sell or market the goods or property in question, is contrary to both the legislative history (S. Rep. No. 145, 87th Cong., 1st Sess., p. 38; S. Rep. No. 1487, 89th Cong., 2d Sess., pp 7-8) and the pertinent judicial decisions cited by the court below (Pet App. 19). See also *Shultz* v. *Falk*, 439 F. 2d 340 (C.A. 4), certiorari denied *sub nom. Falk* v. *Hodgson*, 404 U.S. 827. Respondents' attempt to distinguish *Wirtz* v. *Jernigan*, 405 F.2d 155 (C.A. 5), on the ground that defendant Jernigan owned the establishment where the sales were made is without substance. Jernigan was not engaged in selling space in the building which he owned, but in selling space on buses which he neither

owned nor operated. Like Arnheim, Jernigan did not "own the receipts from these sales" but was required to remit the balance, after deducting his commissions, to Greyhound. The Fifth Circuit nonetheless held that the full amount of the ticket receipts had to be counted in determining Jernigan's annual dollar volume of sales. The earlier district court decision cited by respondents is contrary to *Jernigan* and the other circuit court cases.

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BRENNAN, SECRETARY OF LABOR *v.* ARNHEIM & NEELY, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 71-1598. Argued January 16, 1973—Decided February 28, 1973

Respondent, a fully integrated real estate management company directing from its central office manifold operations at nine separately owned buildings, including leasing the properties for the owners and hiring, firing, supervising, and negotiating the wages of, those employed in the buildings, *held* to be an "enterprise" within the meaning of § 3 (r) of the Fair Labor Standards Act since respondent conducts related activities through unified operation or control, for a common business purpose. It is irrelevant, for purposes of defining the respondent's enterprise under § 3 (r), that the building owners, who are not defendants in this enforcement action under the Act, have no relationship with one another and no common business purpose, since their activities as employers are not at issue here. Pp. 5-9.

444 F. 2d 609, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. WHITE, J., filed a dissenting opinion.

NOTE: Where it is feasible, a syllabus (headnote) will be released, as to cases subject to orders, as to which there is no dissent. A syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BRENNAN, SECRETARY OF LABOR *v.*
ARNHEIM & NEELY, INC. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 71-1656. Argued January 16, 1973—Decided February 26, 1973

Respondent, a fully integrated real estate management company deriving from its entire office manhole operations at nine separate owned buildings, including issuing the paychecks for the owners and paying firms supervising, and negotiating the wages of those employed in the buildings, held to be an "enterprise" within the meaning of § 3 (r) of the Fair Labor Standards Act over respondent modern related services through unified operation or control for a common business purpose. [Fn's omitted, for purposes of defining the respondent's enterprise under § 3 (r), that the building owners, who are not defendants in the enforcement action under the Act, have no relationship with one another and no common business purpose, since their services as employers are not at issue here. Pp. 3-9.

464 F. 2d 606 reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. WHITE, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-1598

Peter J. Brennan, Secretary of Labor, Petitioner, *v.* Arnheim and Neely, Inc., et al.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[February 28, 1973]

MR. JUSTICE STEWART delivered the opinion of the Court.

This case began when the Secretary of Labor sued the respondent, a real estate management company, for alleged violations of the Fair Labor Standards Act as amended, 29 U. S. C. § 201 *et seq.* The Secretary sought an injunction against future violations of the minimum wage, overtime, and recordkeeping provisions of the Act, as well as back wages for the affected employees. An employee is entitled to the benefits of the minimum wage and maximum hours provisions of the Act if he is, *inter alia*, "employed in an enterprise engaged in commerce or in the production of goods for commerce. . . ." 29 U. S. C. §§ 206 (a), 207 (a).

As stipulated in the District Court, the respondent company manages eight commercial office buildings and one apartment complex in the Pittsburgh area. With the exception of a minor ownership interest in one of the buildings, the respondent does not own these properties. Its services are provided according to management contracts entered into with the owners. Under these contracts, the respondent obtains tenants for the buildings, negotiates and signs leases, institutes whatever legal

actions are necessary with respect to these leases, and generally manages and maintains the properties. The respondent collects rental payments on behalf of the owners, and deposits them in separate bank accounts for each building. These accounts, net of management expenses and the respondent's fees, belong to the owners of the properties. Payments are periodically made from the accounts to these owners.

The respondent's services with respect to the supervisory, maintenance, and janitorial staffs of the buildings are similarly extensive. The respondent conducts the hiring, firing, payroll operations, and job supervision of those employed in the buildings. It also fixes hours of work, and negotiates rates of pay and fringe benefits—subject to the approval of the owners. The respondent engages in collective bargaining on behalf of the owners where the building employees are unionized. 324 F. Supp. 987, 990-991.

The District Court held that the maintenance, custodial and operational workers at the buildings managed by the respondent were "employees," and that the respondent was an "employer," within the meaning of §§ 3 (d) and 3 (e) of the Act, 29 U. S. C. §§ 203 (d), (e). 324 F. Supp. 987, 990-993. The District Court also held that gross rentals, rather than commissions obtained, were the proper measure of "annual gross volume of sales made or business done" for purposes of the dollar volume portion of the statutory definition of an "enterprise engaged in commerce." *Id.*, 993-994.[1] Though it

[1] In pertinent part, the statute provides that:

"(s) 'Enterprise engaged in commerce or in the production of goods for commerce' means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—

"(1) during the period February 1, 1967, through January 31,

rejected the claim that the respondent was sufficiently engaged in commerce for its employees to be covered for the time before the 1966 amendments to the Act went into effect,[1] the District Court determined that the aggregate activities of the respondent at all nine locations were "related," performed under "common control," and for "a common business purpose," thereby constituting an "enterprise" within the meaning of § 3 (r), 29 U. S. C. § 203 (r). 324 F. Supp. 987, 994–995.

On cross appeals, the Court of Appeals for the Third Circuit affirmed the District Court's determination that the respondent is an "employer" of the building's "employees," and also affirmed the use of gross rentals of

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1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated). . . ." 29 U. S. C. § 203 (s).

[1] Section 3 (s)(3) of the Act, as enacted in 1961, referred in its definition of "enterprise engaged in commerce or in the production of goods for commerce," *inter alia*, to: "*any establishment* of any such enterprise, . . . *which has employees engaged in commerce or in the production of goods for commerce* if the annual gross volume of sales of such enterprise is not less than $1,000,000. . . ." Pub. L. 87–30, 75 Stat. 65, 66 (emphasis added). The District Court construed the statute to require that two or more employees in each building be engaged in commerce in order for that building to be covered under the Act. It found that in no building were there two such employees, and therefore held that there was no coverage under the Act prior to the 1966 amendments. 324 F. Supp. 987, 995–997. The 1966 amendments, see n. 1, *supra*, required only that the "enterprise" have "employees" engaged in commerce, and under this standard the District Court found that the respondent qualified. *Id.*, at 997. Though the Government appealed on this issue, the Court of Appeals did not reach it, 444 F. 2d 609, 614.

the buildings as the proper measure of "gross sales." 444 F. 2d 609, 611–612. The Court of Appeals held that the District Court erred, however, in aggregating the gross rentals of the nine properties to determine the "gross sales" of the respondent's "enterprise." Recognizing that its decision conflicted with a substantially identical case in the Fourth Circuit, *Shultz* v. *Falk*, 439 F. 2d 340, the Court of Appeals held that before separate establishments could be deemed part of a single enterprise, a showing of common business purpose was required. 444 F. 2d 609, 613.

> "If the record in this case revealed that the retention of the Company, as agent, were accompanied by a change in the independent business purposes of the owners—for example facts such as the pooling of profits from the various buildings demonstrating a common business purpose—the result might be different. Here, however, the record reveals that the owners share no common purpose except the decision to hire the Company as their rental or management agent. . . . Without more than here presented, we think the 'enterprise' requirement of the Act has not been satisfied." *Id.*, 614.

Without reaching the issues regarding the respondent's engagement in commerce prior to 1967, the Court of Appeals reversed and remanded for proof of the individual gross rentals of the buildings. *Ibid.* In order to resolve the inter-circuit conflict, we granted the Secretary's petition for certiorari, — U. S. —, which raises the question whether the management activities of the respondent at all of the buildings served should be aggregated as part of a single "enterprise" within the meaning of § 3 (r) of the Act. Since no cross-petition for certiorari was filed by the respondent, the important issues of whether the respondent is in fact an "employer" of the building workers within the meaning of the Act,

and whether gross rentals rather than gross commissions should serve as the measure of "gross sales," are not before us.[3]

The concept of "enterprise" under the Fair Labor Standards Act came into being with the 1961 amendments, which substantially broadened the coverage of the Act. Rather than confining the protections of the Act to employees who were themselves "engaged in commerce or in the production of goods for commerce," 29 U. S. C. §§ 206 (a), 207 (a), the new amendments brought those "employed in an enterprise engaged in commerce" within the ambit of the minimum wage and maximum hours provisions.[4] The Congress defined "enterprise engaged in commerce" to include a dollar volume limitation. The standard in the original amendments included "any such enterprise which has one or more retail or service establishments if the annual gross volume of sales of such enterprise is not less than $1,000,000. . . ." Pub. L. 87–30, 75 Stat. 65, 66, and has since been changed to include enterprises "whose annual gross volume of sales made or business done is not less than $500,000" for the period from February 1, 1967, to January 31, 1969, and those with gross sales of not less than $250,000 thereafter. 29 U. S. C. § 203 (s) (1). The presence of this dollar volume cutoff for coverage under the Act in turn places importance on the Act's definition of "enterprise."

The term "enterprise' is defined by the statute as follows:

> "'Enterprise' means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities *whether*

[3] *NLRB* v. *International Van Lines*, — U. S. —, n. 4, and cases there cited. But see n. 8, *infra*.

[4] Pub. L. 87–30, 75 Stat. 65, 67, 69.

performed in one or more establishments or by one or more corporate or other organizational units. . . ." 29 U. S. C. § 203 (r) (emphasis added).

Specific exemptions are noted, making clear that exclusive dealership arrangements, collective purchasing pools, franchises, and leases of business premises from large commercial landlords do not create "enterprises" within the meaning of the Act. *Ibid.*

The District Court correctly identified the three main elements of the statutory definition of "enterprise": related activities, unified operation or common control, and common business purpose. We believe the Court of Appeals erred in holding that the aggregate management activities of the respondent failed to meet these statutory criteria. Once the respondent is recognized to be the employer of all of the building employees, it follows quite simply that it is a single enterprise under the Act. The respondent is, after all, but one company. Its activities in all of the buildings are virtually identical, and are plainly "related" in the sense that Congress intended. As the Senate report accompanying the 1961 amendments indicated: "Within the meaning of this term, activities are 'related' when they are the same or similar. . . ." S. Rep. No. 145, 87th Cong., 1st Sess. 41. The respondent's activities, similarly, are performed "either through unified operation or common control." The respondent is a fully integrated management company directing operations at all nine buildings from its central office. For purposes of determining whether it is an "enterprise" under the Act, it is irrelevant that the relationship between the respondent and the owners is one of agency, that separate bank accounts are maintained for each building, and that the risk of loss and the chance of gain on capital investement belong to the owners, not the respondent. All that is required under the statutory definition is that the respondent's *own* activities be re-

lated and under common control or unified operation, as they plainly are.

In its analysis of this problem, the Court of Appeals placed great weight on the fact that the building owners have no relationship with one another, and have no common business purpose. This is true, but beside the point, for the owners are not defendants in this action and it is not *their* activities that are under examination. As Judge Winter wrote in the conflicting case from the Fourth Circuit, "It is *defendants'* activities at each building which must be held together by a common business purpose, not all the activities of all owners of apartment projects." *Shultz* v. *Falk, supra,* at 346. In the present case, the respondent's activities at the several locations are tied together by the common business purpose of managing commercial properties for profit. The fact that the buildings are separate establishments is specifically made irrelevant by § 3 (r).

The Court of Appeals also cited the portion of the Senate report explaining the exemptions to § 3 (r), noted above, for exclusive dealing contracts, franchises, leasing space in shopping centers, and the like:

> "The bill also contains provisions which should insure that a small local independent business, not in itself large enough to come within the new coverage, will not become subject to the act by being considered a part of a large enterprise with which it has business dealings.
>
> "The definition of 'enterprise' expressly makes it clear that a local retail or service establishment which is under independent ownership shall not be considered to be so operated and controlled as to be other than a separate enterprise because of a franchise, or group purchasing, or group advertising arrangement with other establishments or because the establishment leases premises from a person who also